No. B225993

Court of Appeal Of The State Of California
Second Appellate District, Division Two

FULLER-AUSTIN INSULATION COMPANY,

Plaintiff and Appellant,

vs.

RESOLUTE MANAGEMENT, INC. – NEW ENGLAND DIVISION, and NATIONAL INDEMNITY COMPANY

Defendants and Respondents,

APPELLANT'S REPLY BRIEF

Appeal of Judgments
Superior Court, County of Los Angeles, Case No. BC116835
The Hon. Emilie H. Elias

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APPELLANT'S REPLY BRIEF

I. INTRODUCTION [1]

Defendants' position on this appeal is startling. Fuller-Austin bought insurance coverage from Stonewall and fully paid its premiums for that protection. What remains to be done pursuant to the Fuller-Austin/Stonewall policyholder/insurer relationship, now that Fuller-Austin has tendered its asbestos liabilities, is for Stonewall to evaluate and pay them if they are covered under Stonewall's insurance policy. Stonewall policy no. 12173, which is attached to the operative complaint, did not provide a duty to defend, and hence the only coverage at issue in this case is indemnification. *See* [4]AA[6]:1147, *et seq.* Fuller-Austin alleges that NICO has assumed complete control over all of Stonewall's claims handling functions and has unrestricted power to decide, regardless of Stonewall's views, whether or when to pay Fuller-Austin's claims. Fuller-Austin further alleges that this "does not constitute a traditional, or responsible, third-party administrator arrangement.... The arrangement created by NICO involves the wholesale replacement of the insurance company with whom the policyholder chose to contract, with complete strangers.... NICO's 'reinsurance' contracts truly are investment vehicles. They are not traditional reinsurance. Investment return is maximized when payment is reduced, delayed, or outright denied for as long

[1] Appellant's Opening Brief is cited "AOB-__." Resolute's Brief is cited "Resolute Br.__." NICO's Brief is cited "NICO Br.__." Appellant's Appendix is cited "[volume]AA[tab]:___." Emphasis has been added in quotations, and citations omitted, unless stated otherwise.

as possible." [4]AA[6]:1136:9-20. Thus, Fuller-Austin's claims against NICO are not premised on it functioning as a reinsurer. Rather, Fuller-Austin alleges that NICO, and its agent Resolute, by assuming exclusive responsibility to adjust, handle, and compromise claims brought by Stonewall policyholders, have injected themselves directly into the policyholder/insurer relationship and have used this authority to deprive Fuller-Austin of the indemnification owed under the Stonewall policies. Fuller-Austin alleges that Stonewall has no further say or influence over the matter: "[i]n sum, Stonewall now acts merely as a spectator in the resolution of claims brought under policies it sold, and NICO and Resolute now exercise full and unfettered control over Stonewall policyholder claims." [4]AA[6]:1137:19-21.

It is the strong policy of the law to assign responsibility to those who breach contracts and to those who, by their conduct, violate the societal norms reflected in tort law. Remarkably, defendants contend that the law exempts them from responsibility for their own actions. It cannot be that NICO or Resolute can assume, direct, and completely control performance of the remaining obligations owed to Fuller-Austin under the Stonewall policy, in flagrant disregard of Fuller-Austin's rights, and yet escape all responsibility for their *own* actions.

It cannot be, and it is not. Fuller-Austin has set forth California law rejecting blanket immunity to those who label themselves "reinsurers" or "agents." Actual conduct and actual agreements must be scrutinized. *See* AOB-32-36. NICO and Resolute give these authorities short shrift. NICO

and Resolute do not even try to deal with many of Fuller-Austin's points showing how the trial court has erred.

Thus, defendants do not address Fuller-Austin's point that it was improper for the trial court to determine the nature of the relationships between Stonewall, NICO, and Resolute, when none of the agreements involving NICO or Resolute were before the court. *See* AOB-32-33. This is an established ground for reversal on a demurrer, and both defendants ignore the point altogether.

This error underscores others. The trial court improperly determined that the label "reinsurer" is dispositive of Fuller-Austin's rights, and defendants follow the same playbook. But Fuller-Austin's complaint alleges facts demonstrating that NICO does not function as "a traditional reinsur[er] …," [4]AA[6]:1136:18-19, and that "[t]he arrangement created by NICO involves the wholesale replacement of the insurance company, with whom the policyholder chose to contract, with complete strangers to those contracts whose interests are not in paying claims, but in improving performance of their investments." [4]AA[6]:1136:13-16. Likewise, the trial court improperly concluded that NICO is Stonewall's agent. Fuller-Austin alleges that NICO is *not* a mere third-party claims administrator, controlled by and acting on behalf of Stonewall. Instead, NICO has "assumed the insuring obligations of Stonewall under the insurance policies issued to Fuller-Austin" and "Stonewall now claims that it is not even in a position to either acknowledge or deny coverage, as it is no longer authorized to make such decisions." [4]AA[6]:1128:1-2, 1137:1-2. In analyzing this case, emphasis must be placed

on whether "the facts in the case show the contract in question to be much broader than a mere technical contract of reinsurance." *Sawyer v. Sunset Mut. Life Ins. Co.* (1937) 8 Cal.2d 492, 496. Here, that is exactly what the alleged facts show.

Defendants do not address Fuller-Austin's point that *traditional indemnity reinsurers* are the *only* beneficiaries of the rule that a ceding insurer's policyholder has no "interest" in a reinsurance treaty and, therefore, may not sue the indemnity reinsurer for breach of contract when the policyholder's claim is not satisfactorily paid by the ceding insurer. *See* AOB-35-36. NICO buries its discussion of *Catholic Mutual Relief Society v. Superior Court* (2007) 42 Cal.4th 358, 374. Yet that case is the most recent pronouncement by our Supreme Court that a reinsurer that injects itself into the policyholder/insurer relationship (such as by taking control over the investigation and payment of policyholder claims) is not immunized from direct liability to the policyholder. *Fuller*-Austin has pleaded that Stonewall is a mere front; that NICO, through its agent Resolute, investigates claims and decides whether to pay them. [4]AA[6]:11291 (¶12). Of note, the court sustained the demurrer without leave to amend even though Fuller-Austin provided evidence showing that Stonewall, a mere shell with no employees and no say in claims decisions, could not be anything more than a front for NICO even if it wanted to play a greater role. [1]AA[26]:001573.

Defendants do not dispute Fuller-Austin's allegations that NICO exercises complete control over the adjustment of claims by Stonewall policy-holders, meaning that NICO is not functioning as an indemnity reinsurer in its

relationship with Stonewall. An indemnity reinsurer "does not alter the original or ceding insurer's relationship with its policyholder. Claims by the policyholder are paid by the ceding insurer who then turns to the reinsurer for reimbursement. The reinsurer 'follows the fortunes' of the original insurer...." *Lipton v. Superior Court* (1996) 48 Cal.App.4th 1599, 1617; *see also Zenith Ins. Co. v. Cozen O'Connor* (2007) 148 Cal.App.4th 998, 1007. These authorities go unaddressed by defendants.

Defendants do not address California law to the effect that whether, or if, there has been an assumption of a party's obligations is a question of fact. *See Gregors v. Peterson Ice Cream Co., Inc.* (1958) 158 Cal.App.2d 746, 751. Even assuming the trial court's holding that a reinsurer must assume "all" of an insurer's obligations to expose itself to direct liability to the policyholder, defendants do not directly address Fuller-Austin's point that NICO did in fact assume *all* of Stonewall's remaining obligations toward Fuller-Austin because all that remains is to adjust and make a determination whether to pay claims. *See* AOB-38. Stonewall never had any duty to defend Fuller-Austin under its excess insurance policies. [4]AA[6]:1147, *et seq*. And the fact that Stonewall itself remains obligated toward Fuller-Austin does not defeat the fact that NICO, by its assumption of obligations Stonewall owed to Fuller-Austin, also is liable to Fuller-Austin. *See* AOB-38. In such situations, both the original insurer and the reinsurer are liable to the policyholder. *See Travelers Indemnity Co. v. Gillespie* (1990) 50 Cal.3d 82, 95-96.

Defendants do not address Fuller-Austin's point that California Insurance Code §922.2(c) applies when a ceding insurer becomes insolvent.

In that circumstance, the statute clears the way for a traditional indemnity reinsurer to assume defense obligations without thereby becoming a target of direct suits by the ceding insurer's policyholder. *See* AOB-42. No one claims this insolvency scenario is present here.

What then do the defendants say for themselves? NICO claims that it cannot be sued for interference with the Stonewall/Fuller-Austin insurance contract because Fuller-Austin used the term "reinsurer" to describe NICO (while ignoring the remaining substantive allegations that differentiate between traditional indemnity reinsurers from those, like NICO, who assume ceding insurer obligations to policyholder) and because it claims immunity as an agent of Stonewall or as someone "interested" in the Stonewall/Fuller-Austin insurance policy. Resolute coattails NICO's arguments by asserting that it is NICO's agent and thus may benefit from any immunity from suit enjoyed by NICO. With respect to liability for breach of contract and bad faith breach of the implied covenant of good faith and fair dealing, NICO claims it is not a party to any contract with Fuller-Austin and has no contractual duty toward it.

These points have no merit.

Fuller-Austin may sue NICO for breach of contract because NICO took over from Stonewall its obligations owed to Fuller-Austin and exercises this authority directly without any control or supervision by Stonewall. NICO is not a party to the Fuller-Austin/Stonewall contract of insurance; it does not need to be; rather, Fuller-Austin is deemed a third-party beneficiary of the agreement by which NICO assumed Stonewall's obligation to Fuller-Austin.

See Columbia Casualty Co. v. Industrial Accident Comm'n (1936) 5 Cal.2d 770, 778; *Travelers*, 50 Cal.3d at 95 ("Execution of [] an [assumption] agreement does not in any way release the original insurer from its policy obligations; rather, it results in both the original insurer and the assuming insurer being obligated to the insured.").

Fuller-Austin may sue NICO and Resolute because they have interfered with Stonewall's performance of its obligations toward Fuller-Austin under the Stonewall/Fuller-Austin insurance policy, frustrating Fuller-Austin's rights to secure the indemnification owed. Again, they have done so autonomously, sans any control exerted over them by Stonewall.

II. FULLER-AUSTIN PROPERLY ALLEGED CAUSES OF ACTION FOR INTERFERENCE WITH CONTRACT AGAINST NICO & RESOLUTE

Defendants argue that Fuller-Austin cannot assert claims for interference with contract against them because while they are "not [parties] to the Stonewall policies, [they are] also not a stranger to those contracts." NICO Br.47. According to defendants, because they have "a business or economic interest in the contracts," they "are immune from liability for tortious interference with such contracts." Resolute Br.15. Defendants also claim that they enjoy protection against claims for interference because NICO is Stonewall's agent in the administration of claims. Therefore (they say), NICO enjoys immunity from claims for interference with the contracts of its supposed principal, Stonewall. Resolute seeks to coattail NICO's immunity on the basis that Resolute is NICO's agent.

Defendants misread the law. The existence of an economic interest in a contract is *not* sufficient to excuse a third party from liability for interference with that contract. Moreover, where, as here, the complaint alleges facts showing that NICO and Resolute are *not* agents of Stonewall, any protection that the law extends to agents is unavailable.

Reversal is required because the trial court improperly disregarded allegations that preclude any determination as a matter of law that NICO is Stonewall's agent or that NICO has acted as an agent in furtherance of Stonewall's interests when dealing with Fuller-Austin's claims for coverage.

A. Only Parties To A Contract Are Unconditionally Immune From Liability For Tortious Interference With Contract; Neither NICO Nor Resolute Were Parties To The Stonewall/Fuller-Austin Insurance Policy

Parties to a contract may not be sued for interfering with it. That rule does defendants no good because they were not parties to the Stonewall/ Fuller-Austin insurance policy. Beyond such party immunity from liability, California courts have been most reticent about extending immunity any further.

In *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, our Supreme Court re-affirmed the rule that the only persons who are unconditionally immune from liability for tortious interference with a contract are the parties to that contract. The Court overruled a line of cases holding that a party to a contract could be liable for conspiracy to interfere with its own contract. *Id.* at 511, 513–514. In order to underline the unconditional immunity *of contracting parties*, the Court in *Applied*

Equipment did a number of things, from devoting a significant portion of its opinion to a discussion of the differences between contract and tort law (*id.* at 514-18), to explaining how its decision would bring California law back into line with other leading jurisdictions. *Id.* at 518-19. In addition to these more indirect methods, the Court expressly and repeatedly stated that unconditional immunity applies to contracting parties:

> California recognizes a cause of action against *noncontracting parties* who interfere with the performance of a contract. 'It has long been held that *a stranger to a contract* may be liable in tort for intentionally interfering with the performance of the contract.' ... [¶] However, consistent with its underlying policy of protecting the expectations of contracting parties against frustration *by outsiders* who have no legitimate social or economic interest in the contractual relationship, the tort cause of action for interference with a contract does not lie against a party to the contract.

Id. at 513-14 (emphasis in original); *see also Pacific Gas & Elec. Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 ("It has long been held that a stranger to a contract may be liable in tort for intentionally interfering with the performance of the contract"). In order to further reinforce that unconditional immunity extended to contracting parties, *Applied Equipment* used the term "stranger to a contract" interchangeably with the terms "noncontracting parties" and "third parties." *See id.* at 513–514, 516–517. Moreover, when distinguishing interference with contract from other torts, *Applied Equipment* also stated that the interference tort "cannot be committed by a contracting party ...." *Id.* at 520, fn. 8.

When one moves past contracting parties to others, immunity from claims for interference with a contract is either conditional or altogether missing.

B. While Agents Enjoy A Measure Of Protection Against Claims That They Have Interfered With Their Principals' Contracts, Neither NICO Nor Resolute Is Eligible For This Protection Because Neither Has Been Conclusively Shown To Be Stonewall's Agent

"[C]orporate agents and employees acting for and on behalf of a corporation cannot be liable for inducing a corporation's control." *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 24-25. The agent must be "acting for and on behalf" of the principal. Thus, "an agent loses his or her protection when he is acting for his own benefit or advantage rather than solely on behalf of and at the direction of his or her principal." *Thornburg v. Superior Court* (2006) 138 Cal.App.4th 43, 52.

Fuller-Austin alleges numerous facts which establish that NICO and Resolute are *not* agents of Stonewall. Fuller-Austin has pleaded facts, not legal conclusions. The allegations show that Resolute was NICO's agent, not Stonewall's, and that NICO both assumed and has exercised complete control over all of Stonewall's remaining contractual obligations to its insurance policyholder, Fuller-Austin. These facts-specific allegations include that NICO controls and makes final decisions based on NICO's own financial self-interest, regardless of whether policyholder claims qualify for coverage and regardless of Stonewall's interests. [4]AA[6]:1136 (¶36), 1137 (¶¶40-41). NICO does not take direction from Stonewall and it is not subject to control by Stonewall. As Stonewall itself has stated, "it is not even in a position to either acknowledge or deny coverage, as it is no longer authorized to make such decisions." [4]AA[6]:1137:1-2. Indeed, and as pleaded by Fuller-Austin, "Stonewall acknowledges that NICO and Resolute have usurped full authority

over claims brought by Stonewall policyholders under policies sold by Stonewall, and that Stonewall has no right to make claims determinations under the policies of insurance sold to Fuller-Austin." [4]AA[6]:1139:23-27. Stated another way, Fuller-Austin has alleged that "Stonewall now acts as a mere spectator in the resolution of claims brought under policies it sold...." [4]AA[6]:1137:19-21.

These allegations, which must be accepted as true on demurrer, prevent the trial court from concluding, as it erroneously did, that NICO is Stonewall's agent for purposes of Stonewall's dealings with Fuller-Austin, or that Resolute, as NICO's agent, may coattail on an immunity from suit that NICO might enjoy *if it were conclusively established* that NICO was in fact Stonewall's agent.[2]

First, Fuller-Austin's allegations establish on demurrer that NICO is not Stonewall's agent because Stonewall does not control the actions NICO takes. "In the absence of the essential characteristic of the right of control, there is no true agency...." *Edwards v. Freeman* (1949) 34 Cal.2d 589, 592.

> The right of the alleged principal to control the behavior of the alleged agent is an essential element which must be factually present in order to establish the existence of agency, and has long been recognized as such in the decisional law.

DeSuza v. Andersack (1976) 63 Cal.App.3d 694, 699; *see also St. Paul Ins. Co. v. Industrial Underwriters Ins. Co.* (1989) 214 Cal.App.3d 117, 123 ("essential element of an agency relationship is the right of control....").

Second, Fuller-Austin's allegations establish that NICO is not Stonewall's agent because NICO has not been acting pursuant to authority granted

[2] [6]AA[21]1504:22–1506:1.

to NICO by Stonewall. A true agent must have authority conferred by the principal. *van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 572. Stonewall has objected to NICO's assumption of complete control over the adjustment of claims by Stonewall policyholders. [4]AA[6]:1137 (¶40) (Stonewall has accused NICO "of improperly interfering with Stonewall's claims handling responsibilities to its insured" and of "usurp[ing] all authority" over claims).

Third, Fuller-Austin's allegations establish that NICO is not Stonewall's agent because Stonewall has not consented to the actions taken by NICO and Resolute that are at issue in this case, but has objected to them. *Ibid.* For an agency to exist, there must be "the manifestation of consent by one person to another that the other shall act on his behalf...." *Edwards*, 34 Cal.2d at 592, *quoting*, Restatement, Agency, §1.

The trial court and the defendants have ignored the facts alleged and have focused instead on labels and titles. But the existence of a principal and agent relationship depends on facts, not labels. "The fact that parties had a preexisting relationship is not sufficient to make one party the agent for the other.... [Citation.] An agency is proved by evidence that the person for whom the work was performed had the right to control the activities of the alleged agent." *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 983. The existence of an agency relationship is a question of fact. *Inglewood Teachers Ass'n v. Pacific Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 780.

Thus, the job title "third-party administrator" does not establish that a person with that title is necessarily an agent working on behalf of an insurer and subject to its control. A third-party administrator can be an agent when "[t]he insurer, not the adjuster, has the ultimate power to grant or deny coverage, and to pay the claim, delay paying it, or deny it." *Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 253.[3] But when, as here, the complaint alleges that the insurer possesses no such power, and the power to decide on payment of claims resides with someone else, the third-party claims administrator is not acting as an agent at all. When that person is not "an agent[] [or] employee[] acting for and on behalf [of] the" insurer,[4] no principle of law prohibits claims for tortious interference with contract and defendants cite no case suggesting otherwise.

The mere pleading of existence of an agreement between Stonewall and NICO, which agreement was not before the Court, does not *ipse dixit* establish a principal-agent relationship. Indeed, even if the agreement were before the trial court, "contract recitals of the existence or absence of agency, while relevant, are never determinative." *Pistone v. Superior Court* (1991) 228 Cal. App. 3d 672, 680. Rather, "cases freely allow parties to contradict 'clear' contract language and show their actual relationships." *Id.* Thus, not only did the trial court assume the existence of an agency relationship from the mere

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[3] Oddly, the trial court found that *Sanchez* "does not advance Fuller-Austin's position; it held that '[a]n independent adjuster engaged by an insurer owes no duty of care to the claimant insured, with whom the adjuster has no contract.'" [6]AA[21]:001503. But, the trial court failed to address the issue of control and whether a true principal-agent relationship existed, a fundamental pillar of the *Sanchez* decision.

[4] *Shoemaker*, 52 Cal.3d at 24-25 (stating the rule for agent immunity).

existence of a contract it never reviewed, it then ignored the allegations by Fuller-Austin to the effect that Stonewall admitted that no such agency relationship existed between it and NICO irrespective of what the contract may or may not have said.

Here, the trial court and the defendants commit a double-fault. First, they bypass the allegations made by Fuller-Austin that NICO has usurped Stonewall's obligations owed to Fuller-Austin and neither seeks nor needs Stonewall's approval for any of its actions. Second, even if the trial court were entitled to ignore these allegations (it was not), the court was not entitled to go even further and assume that NICO was in fact the agent of Stonewall, "acting for and on behalf of the" insurer. In other words, ignoring Fuller-Austin's allegations that NICO acts on its own, and is not subject to Stonewall's direction and control, did not accord the court the right to reach the opposite conclusion on the pleadings before it. This is so because "[t]he law indulges in no presumption that an agency exists but instead presumes that a person is acting for himself and not as agent for another." *K. King and G. Shuler Corp. v. King* (1968) 259 Cal.App.2d 383, 393, *disapproved on another point in Liodas v. Sahadi* (1977) 19 Cal.3d 278.

Defendants cite numerous inapposite cases that recognize immunity from tortious interference claims for the benefit of those who are established to be agents. In each such case, the complaining party admitted the existence of an agency relationship or the documents attached to the operative complaint established such an agency relationship as a matter of law. Such is not the situation here.

For example, defendants rely upon *Mintz v. Blue Cross of California* (2009) 172 Cal.App.4th 1594, for the proposition that, as a result of their position as administrators of the Stonewall policies, they are not strangers to those policies and, therefore, are immune from liability for interference. NICO Br.45-47; Resolute Br.10-12. But *Mintz* does not support defendants' position because the insurance contract in *Mintz*, which was attached to the pleading, expressly established that Blue Cross was an agent of the insurer: "the contract of insurance attached to the complaint — the "Evidence of Coverage" — by its terms establishes that Blue Cross acts as an agent for CalPERS in administering the contract of insurance." *Id.* at 1603. Because the contract in question was attached to the complaint, the court could take judicial notice of it. In contrast, neither NICO nor Resolute is identified in Stonewall's policies as its agent. Neither NICO nor Resolute is even mentioned in those policies. The alleged assumption agreement between Stonewall and NICO was not attached to the complaint. Defendants did not seek to have the court consider it on demurrer. In addition, whatever the terms of the assumption agreement, facts pertaining to the performance of it are relevant, for they would illuminate the issues of what NICO assumed, and on what terms. Thus, the trial court was not in a position to determine whether, or if, the assumption agreement created an agency relationship between NICO and Stonewall or, assuming that it did, whether NICO acted in conformity with it, on behalf of Stonewall, or whether NICO acted in its own interest, free of the Stonewall control that is necessary for a true agency.[5]

[5] The court in *Doctors Medical Center of Modesto v. Global Excel Management, Inc.* (E.D. Cal. 2009) 2009 U.S. Dist., LEXIS 71634,

Defendants cite *Shoemaker*, 52 Cal.3d at 1. In that case, the plaintiff brought an interference claim against his own supervisors who worked for the same employer. When employees act on behalf of the corporation, they cannot be sued for interference with the corporation's contracts. This ruling is inapplicable when it has not been established that the defendants are in fact employees or agents acting on behalf of another.

The decision in *Gruenberg v. Aetna Life Ins. Co.* (1973) 9 Cal.3d 566, 576, upon which *Shoemaker* rests its holding, is instructive. There, the plaintiff alleged that third parties (an adjusting firm) "were the agents and employees of defendant insurers and each other and were acting within the scope of that agency and employment when they committed the acts attributed to them." Based on this pleading admission, the Supreme Court held that the insurer's agents and employees could not be held accountable on a tort theory, explaining that this rule "derives from the principle that ordinarily corporate agents and employees acting *for and on behalf of the corporation* cannot be held liable for inducing a breach of the corporation's contracts since being in a confidential relationship to the corporation their action in this respect is privileged." *Id.* at 576.

What *Gruenberg* recognizes is that, where it is established that a third party is acting on behalf of and within the scope of an agency relationship, then conduct in conformity therewith cannot expose the third party to tort liability. But, the cases make clear that protection of agents from claims exists as a matter of law only when it is admitted by the pleader or established by

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distinguished *Mintz* on the basis that it articulates a rule applicable when the evidence of an agency relationship is *not* disputed.

documents attached to the complaint that the third party is an agent acting as such.

The decisions in *Mintz* and *Shoemaker* do not advance defendants' position because Fuller-Austin has alleged that NICO was not acting as Fuller-Austin's agent. It was error for the trial court to sustain the demurrer by assuming, contrary to the allegations, that NICO was Fuller-Austin's agent.[6] And it was further error for the trial court to rest that assumption on the content of contracts that were not even before the court, or alleged in detail. *Compare* [8]AA[21]:1504:23 (referring to "aggregate insurance agreement" between Stonewall and NICO, *id.*, 1500:6, *with Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 115 (generally improper for court to determine meaning of a contract on demurrer, especially when the document is not in the record).[7]

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[6] Resolute argues that Fuller-Austin has misdescribed the trial court's ruling by incorrectly suggesting that the trial court found Resolute to be Stonewall's agent. Resolute Br.6-7. Resolute needs to re-read Fuller-Austin's opening brief (AOB-20):

> As for Resolute, which had been sued only for interference with contract, the court sustained the demurrer on the analytically similar basis that Resolute *was alleged to be NICO's agent and, thus, Stonewall's agent* for purposes of carrying out the Fuller-Austin/Stonewall policy and, therefore, Resolute could not be sued for interference with that contract.

Resolute's point is also much ado about nothing. After making an issue about Resolute's status as NICO's agent, and not Stonewall's agent, Resolute concedes that "the allegations of the 7AC establish that Resolute is also the alleged agent of Stonewall...." Resolute Br.6, fn.1.

[7] To the extent that defendants rely upon *Mintz* for the proposition that as Stonewall's claims handlers they are entitled to the protection of a "manager's privilege," their reliance is misplaced. The so-called "manager's privilege" extends to individuals and entities who serve as business advisors or agents and is applicable to advice relating to contracts generally. *Los Angeles*

C. Defendants' Other Authorities Do Not Establish That They Are Entitled To Immunity To Fuller-Austin's Claim For Tortious Interference

Defendants seek to extend protection against suits for tortious interference with contract beyond agents to those claiming some "interest" in a contract, even though they are not parties to it. California law does not support them.

Defendants feature two federal district court cases—*National Rural Telecommunications Coop. v. DIRECTV, Inc.* (C.D. Cal. 2003) 319 F.Supp.2d 1059; and *ViChip Corp. v. Lee* (N.D. Cal. 2006) 438 F.Supp.2d 1087. *See* Resolute Br.15-17. Each has been effectively disapproved by the California Court of Appeal. Subsequent cases do not follow either case.

Both *DIRECTV* and *ViChip* rely upon a Ninth Circuit case, *Marin Tug & Barge, Inc. v. Westport Petroleum, Inc.* (9th Cir. 2001) 271 F.3d 825, 832. In *Marin Tug*, a barge operator sued Shell Oil based on allegations that Shell sold the barge operator contaminated fuel that damaged barge engines. In response to the barge operator's suit, Shell refused to permit the barge operator to load fuel at Shell's refinery, and the barge operator no longer could deliver fuel to its customers. 271 F.3d at p. 828. The barge operator sued Shell for interfering with the barge operator's contracts with its customers. The Ninth

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Airways, Inc. v. Davis (9th Cir. 1982) 687 F.2d 321, 326. A business advisor may counsel his principal to breach a contract that he reasonably believes to be harmful to his principal's best interests. *Ibid.* "The privilege is designed to further certain societal interests by fostering uninhibited advice by agents to their principals." *Id.* at 328. The privilege applies when the defendant acts with a predominant motive to benefit the corporation's interest. The privilege is not vitiated if the agent's motive to advance its personal interests is secondary to benefiting the principal. *Huynh v. Vu* (2003) 111 Cal.App.4th 1183, 1200. The privilege is an affirmative defense and an intensely factual issue. Demurrers to Fuller-Austin's interference claims could not be sustained on this basis.

Circuit affirmed summary judgment for Shell, primarily on the basis that Shell's refusal to deal with the barge operator was not independently wrongful. *Id.* at 834-835. As part of a lengthy discussion of the independent wrongfulness issue, the Court stated that the economic relationship between the barge operator and its fuel purchasing customers depended on Shell's cooperation. *Id.* at 832-834. Since Shell and the barge operator "had a mutual economic interest in delivering the oil safely and cleanly, and were dependent upon each other to do so," Shell was not "a stranger to that relationship." *Id.* at 834.

The court in *DIRECTV* relied on *Marin Tug* to conclude that a third party beneficiary of a contract could not be liable for tortious interference with the contractual relationship. In *DIRECTV*, the defendant entered into a contract with a cooperative to provide satellite television to the plaintiffs, who were the cooperative's members. 319 F.Supp.2d at 1064-1065. The plaintiffs sued the defendant for tortious interference after the defendant refused to provide them certain premium services. *Id.* at 1065. Plaintiffs alleged that the defendant's conduct caused the cooperative to breach its contractual obligations to plaintiffs (the cooperative's members) who provide satellite television services in rural America. *Id.* at 1065-1067. The court concluded that the defendant could not be liable for tortious interference because the defendant had a direct interest and involvement in the contractual relationship between the plaintiffs and the cooperative. *Id.* at 1073.

In *ViChip*, the court also relied on *Marin Tug* to dismiss an intentional interference with prospective economic relations claim because defendants

could not be characterized as "strangers" to the business relationship. 438 F.Supp.2d at 1097. In that case, ViChip, a joint venture, was formed by Lee, VivoDa, and two other Taiwanese companies under a joint venture agreement to develop a particular type of integrated circuit. Lee was chairman of the board of VivoDa, became General Manager, President, and CEO of ViChip Taiwan, and was also the sole director of ViChip California. *Id.* at 1090-91. After a dispute arose between Lee and ViChip, Lee was ousted. ViChip sued claiming theft of its intellectual property and violation of several agreements. Lee counterclaimed for intentional interference by ViChip with Lee's relationship with his other joint-venturers. The court held that under these unique facts no such claim could be asserted because ViChip was expressly set up by the joint venture agreement and its fundamental existence depended on performance of the joint venture agreement. Therefore, ViChip could not interfere with the joint venture agreement. *Id.* at 1097.

Marin Tug and its federal progeny improperly used the *Applied Equipment* phrase, "outsiders who have no legitimate social or economic interest in the contractual relationship," as a basis to immunize from tortious interference liability non-contracting parties who can claim some economic relationship to a contract. Defendants, by their reliance on *DIRECTV* and *ViChip*, have adopted *Marin Tug's* interpretation of California law.

This Court (Division Eight) has refused to read *Marin Tug* as extending immunity from tortious interference claims to those who have an economic interest in a contract. In *Woods v. Fox Broadcasting Sub., Inc.* (2005) 129 Cal.App.4th 344, this Court rejected *Marin Tug's* reading of *Applied*

Equipment. In *Woods*, the trial court concluded that a person or entity with an ownership interest in a corporation is automatically immune from liability for interfering with the corporation's contractual relations. The Court of Appeal disagreed, relying on *Applied Equipment* and rejecting *Marin Tug's* interpretation of that case:

> [The defendant] asks us to conclude that its "version" of *Applied Equipment's* holding – an ownership interest in a business entity's contract confers immunity from tort liability for interfering with the entity's contracts – can be stretched so far that it now protects a defendant who has no more than an economic interest or connection to the plaintiff's contract with some other entity. As with *Applied Equipment*, we believe [the defendant] reads too much into *Marin Tug*. In *Marin Tug*, the Ninth Circuit was primarily focused on the "independent wrongfulness" element of a California tort claim for interference with prospective economic advantage.... The court observed that whether a defendant's improper motives satisfied the "independent wrongfulness" test had not been resolved by the California state courts and therefore it entered that area of law with "trepidation." In this context, it appears that the Ninth Circuit was unsure whether malice might suffice as an element of the prima facie tort, or was instead a component of the qualified privilege defense available to interested persons who act nonmaliciously on behalf of the breaching party. [Citations.] The Ninth Circuit's focus was therefore on the wrongfulness of Shell's refusal to deal with the barge operator, and it evaluated the nature of Shell's relationship with the barge company and the barge company's customers in that light. There is no mention of *Applied Equipment* and, as noted above, the three decisions cited by *Marin Tug* for the immunity of those with a direct interest in someone else's contractual relationship in fact have no bearing on that issue. As a result, *we conclude that Marin Tug did no more than evaluate the wrongfulness of Shell's conduct in the context of its relationships with Marin Tug and the tug company's customers and was <u>not</u> extending immunity from contract interference claims to an even broader, more attenuated class of persons*.

Id. at 355. *Woods* was even more explicit in its disapproval of *DIRECTV*.

According to *Woods*, the court in *DIRECTV* "also failed to properly analyze *Applied Equipment*." 129 Cal.App.4th at 356, fn. 11.

Since *Woods*, courts applying California law disregard *Marin Tug* and the limited authority following it. *See, e.g., G&C Auto Body Inc v. Geico General Ins. Co.* (N.D.Cal. 2008) 552 F.Supp.2d 1015, 1020 ("In light of *Woods*, the Court is unable to conclude that, as a matter of California state law, G&C's intentional interference with prospective economic advantage claim cannot extend to GEICO merely because GEICO has an economic interest in the relationship between G&C and its policyholders. *Woods* casts serious doubts on this Court's ability to rely on *Marin Tug*—or on the federal district courts that have since followed it—for the proposition that the intentional interference claim must fail merely because GEICO is not a stranger to the relationship between G&C and its policyholders").

Defendants' reliance on *PM Group, Inc. v. Stewart* (2007) 154 Cal.App.4th 55, is also misplaced. Resolute Br.16-17. In that case, as in *Applied Equipment*, the Court did not hold that an intentional interference claim fails whenever the defendant has some economic interest in, or could otherwise be characterized as a "non-stranger" to, the relevant business relationships. Indeed, *PM Group* did not involve a ruling on demurrer, but a jury verdict, thereby underscoring that a fact-specific examination of the defendant's relationship to a contract is necessary when assessing whether liability may be affixed for tortious interference with a contract.

In *PM Group*, Rod Stewart, his agent, and his lawyer were sued by a concert promoter and some subpromoters when a Rod Stewart concert tour did

not materialize. The plaintiff-subpromoters sued for a return of deposits they had advanced in payment for the tour and for interfering with their subcontracts to put on the concerts. The jury awarded damages for the return of the deposits and for interference. The Court of Appeal reversed the interference verdict on two grounds. *First*, the Court held that there never was a binding contract between the promoter and Rod Stewart. Therefore, the subcontracts between the promoter and the subpromoters never could have been performed. Thus, the "defendants cannot be said to have caused the failure of the subcontracts" because they never could have been performed unless the promoter had a binding contract with Stewart. *Id.* at 65. *Second*, the Court quoted from *Applied Equipment* and wrote:

> a contracting party is incapable of interfering with the performance of his or her own contract and cannot be held liable in tort for conspiracy to interfere with his or her own contract. (*Ibid.*; *Weinbaum v. Goldfarb, Whitman & Cohen* (1996) 46 Cal.App.4th 1310, 1316-1317, 54 Cal.Rptr.2d 462.) Because the subcontracts at issue here provided for Stewart's performance, neither Stewart nor his agents can be liable for the tort of interfering with the subcontracts.

154 Cal.App.4th at 64. Thus, *PM Group* is a case where the Court treated Rod Stewart as a party to the contracts and subcontracts, meaning he and his representatives could not interfere with them.[8] This is in keeping with *Applied Equipment*; when the Supreme Court referred to "outsiders who have no legitimate social or economic interest in the contractual relationship," it was referring to those who are not contracting parties. *Woods*, 129 Cal.App.4th at 353 ("When *Applied Equipment* did use the term 'stranger to a contract,' it did so interchangeably with the terms 'noncontracting parties.'").

[8] *PM Group* does not cite *Woods* or any of the *Marin Tug* line of cases.

In granting leave to Fuller-Austin to file its latest amended complaint, the trial court noted the highly factual nature of the issues raised by Fuller-Austin's latest pleading: "Stonewall, itself, has accused NICO and Resolute of … improper interference with Stonewall's claims handling obligations ….' [*T*]*he argument raises a factual question that cannot be resolved at the pleading stage*." [5]AA[12]:001335 (emphasis added).

California law does not extend to defendants any immunity from suit for interference with contract based on the allegations Fuller-Austin has made. Defendants do not contend that Fuller-Austin has failed to allege the *prima facie* elements of a claim for tortious interference with contract. It was error for the trial court to terminate the claims against NICO and Resolute on demurrer.

III. NICO IS NOT ENTITLED TO ANY IMMUNITY FROM SUIT BY CLAIMING IT IS A PROTECTED REINSURER

NICO claims that it may not be sued by a policyholder of a ceding insurer because Fuller-Austin called it a reinsurer in its operative complaint. NICO Br.47-50. Resolute claims that, as NICO's agent, it may not be sued either. Resolute Br.5-7. NICO and the trial court find the "reinsurer" label critical. In doing so, they have ignored Fuller-Austin's substantive allegations which show that NICO is not acting as a reinsurer at all. Labels are not controlling. *Sawyer*, 8 Cal.2d at 496.

In support of their claim to reinsurer immunity, defendants point to two California statutes that (they say) restrict the ability of ceding insurer policyholders to pursue "claim[s] against another in its capacity as a

reinsurer." NICO Br.30, *citing* California Insurance Code §623 ("[A]n original insured has no interest in a contract of reinsurance."); *see also* Insurance Code §922.2(c) ("The original insured or policyholder shall not have any rights against the reinsurer which are not specifically set forth in the contract of reinsurance or in a specific agreement between the reinsurer and the original insured or policyholder.").

Defendants misstate the legal impact of these statutes and, based on Fuller-Austin's allegations, the statutes do not defeat Fuller-Austin's claims in this case.

At the outset, defendants cite no authority suggesting that Insurance Code §623 or §922.2(c) exempts reinsurers from claims for interference with a contract when the facts allege the elements of such a claim.

The trial court cited section 922.2(c) in the course of concluding that even interference claims are foreclosed, but the language of that section does not support immunity from tort claims. Section 922.2(c) states that, with certain limitations, a policyholder does not have "any *rights* against the reinsurer" that are not set out in an agreement (the reinsurance treaty or an agreement between reinsurer and policyholder). But the "rights" at issue are necessarily contract rights because, under section 922.2(c), they may then be changed by contract. Nothing suggests that section 922.2(c) eliminates responsibility for tortious misconduct.

Whatever the extent of protection against suits, it does not apply to NICO because NICO is not functioning as a traditional, indemnity reinsurer. Any protections the law extends against suits by ceding policyholders are for

the benefit of traditional, indemnity reinsurers. An indemnity reinsurer plays no part in the adjustment of claims made by the ceding insurer's policyholders. The indemnity reinsurer pays the ceding insurer when the ceding insurer covers a claim that is subject to the reinsurance treaty. The ceding insurer then looks to the reinsurer for indemnity. *See* AOB-34 (and cases cited). In addition, the traditional indemnity reinsurer assumes insurance risk by agreeing to pay claims as the need for coverage occurs, meaning the duty to pay is fortuitous.

NICO has asserted that the trial court's decision may be upheld because Fuller-Austin's complaint refers to NICO at various points as a "reinsurer of Stonewall." *See* NICO Br.48-51. NICO asserts that Fuller-Austin is not allowed to pick and choose which of its allegations should be accepted as true and that, because "NICO is Stonewall's reinsurer … as such [it is] protected from direct liability to Fuller." NICO Br.50. But Fuller-Austin has not alleged that NICO is an indemnity reinsurer. Fuller-Austin has alleged facts establishing that it is not. The specific facts describing NICO's role are crucial. The fact that Fuller-Austin alleges the title NICO has given itself in its dealings with Stonewall ("reinsurer") is not some talismanic assertion that relieves the court of its duty to honor all of the allegations in Fuller-Austin's complaint. *See Sawyer*, 8 Cal.2d at 496 (court looks beyond the title reinsurer to consider the true nature of the role and function of the purported reinsurer). Defendants have not claimed, or cited any authority suggesting, that protections applied to "reinsurers" would extend to a company that is not acting as an indemnity reinsurer.

Insurance Code §623 was enacted before the decisions in *Sawyer,* 8 Cal.2d at 492; *Columbia Casualty*, 5 Cal.2d at 770; *Travelers*, 50 Cal.3d at 82; or *Catholic Mutual,* 42 Cal.4th at 358. This statutory provision has never been interpreted to create a safe harbor based on the title of a document or name ascribed to a party. The issue is not whether an agreement is called a "reinsurance" contract, but whether the titular reinsurer is, on the one hand, providing indemnity reinsurance only or, on the other hand, doing more, like assuming obligations owed by the ceding insurer to its policyholders. *See Travelers*, 50 Cal.3d at 95. This is the relevant question under California law. *See, e.g., Whitney v. American Ins. Co.* (1900) 127 Cal. 464, 470 (if the "reinsurer" assumes "care, control, and management of business risks," then the "reinsurer is jointly liable" with the ceding insurer).[9]

NICO belittles authority from other jurisdictions, including, most notably, *Venetsanos v. Zucker, Facher & Zucker* (1994) 271 N.J. Super. 459, 472-73, but *Venetsanos* is the case embraced by our Supreme Court in *Catholic Mutual*, 42 Cal.4th at 374.[10] In *Venetsanos*, the Court held that

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[9] *Whitney* does not predate Insurance Code §623. Section 623 recodified what had been California Civil Code §2649 since 1872, and provided: "The original insured has no interest in a contract of reinsurance.").

[10] It is not surprising that NICO parrots the trial court's superficial dismissal of the holding in *Equitas Reins. Ltd. v. Browning-Ferris Indus. Inc.* (Tex. App. Hous. 2001) 2001 WL 422765 (not for publication) based solely on the fact that it is an unpublished decision. Faced with an almost identical statutory bar against reinsurers, the *Equitas* court recognized that where a reinsurer "assumed certain claims-handling responsibilities with respect to the original insurers and the insureds" and performs those functions autonomously and with no control exercised by the original insurer, statutory immunity would not bar an action by the policyholder against the reinsurer on its claims handling practices even if the reinsurer "may also have certain reinsurance duties." *Id.*, at *4. In short, a reinsurer is not immune from direct actions when it is not functioning as a traditional indemnity reinsurer.

> an ordinary treaty of reinsurance merely indemnifies the primary insurer against loss rather than against liability. Where, however, the reinsuring agreement itself provides, or the conduct of the reinsurer demonstrates, that it takes charge of and manages the defense of suits against the original insured, the reinsurer may be held to be a "privy" to the action. In such cases, judgment creditors of the insured have been allowed to proceed directly against the reinsurer.

Quoting a respected treatise on insurance, *Venetsanos* identified the critical inquiry, as follows:

> Does a reinsurer have a duty to the primary insured? The answer will usually depend on whether, in the total relationship, the reinsurer has some degree of control over the decisions concerning settlement with the third party claimant. If not, the basis for the duty is lacking; if so, it exists.

Venetsanos, 271 N.J. Super. at 273 quoting Keeton and Widiss, INSURANCE LAW, §7.8(a)(1) (Practitioner's Ed., 1988). The rationale of *Venetsanos* is not undercut by Insurance Code §623 or 922.2(c) because *Venetsanos* "endors[ed] the "general rule that an original insured does not enjoy a right of direct action against a true reinsurer." 271 N.J. Super. at 272.

NICO has ignored another important, limiting principle governing claims against indemnity reinsurers. NICO relies for its claim to immunity from suit on Insurance Code §922.2(c), but NICO has ignored Fuller-Austin's demonstration that section 922.2(c) only applies in cases where the ceding insurer becomes insolvent. Section 922.2(c) is intended to make clear that, when such insolvency occurs, the reinsurer may defend the underlying case against the ceding insurer's policyholder without thereby becoming subject to direct claims by that policyholder. *See* AOB-42. Thus, section 922.2(c) has no relevance here, as Fuller-Austin has argued, and as to which defendants have offered no response.

Relying on this inapplicable statute, section 922.2(c), NICO argues that it can only be liable to Fuller-Austin if it "*expressly agreed*" to assume "*all*" of the duties Stonewall owed to Fuller-Austin. NICO Br.30, citing §922.2(c). But Fuller-Austin has pointed out on appeal (without response from defendants) that NICO has assumed *all* of Stonewall's remaining obligations under its insurance policy with Fuller-Austin, given that Stonewall never had *any* duty to defend under its excess coverage, and all that remains to be done is to adjust and pay Fuller-Austin claims for indemnification. Fuller-Austin has clearly alleged that NICO and Resolute now fully and completely control all of Stonewall's claims functions, not merely in the sense that they adjust claims, but they and they alone decide what claims to honor, without any input from Stonewall. *See* AOB-38. If the law requires full assumption of insurer duties, that requirement is met here by Fuller-Austin's allegations.

Moreover, while defendants argue that most of the existing California cases involve situations where the reinsurer fully assumed all of the ceding insurer's duties to its policyholders, nothing suggests that this circumstance is a defining precondition to reinsurer liability to policyholders. Courts recognize and enforce partial assignments of contract obligations. *See* AOB-39. Defendants do not fault that proposition of contract law. And public policy supports no such "full assignment" prerequisite to policyholder suits. Indeed, the *sine qua non* of holding reinsurers directly liable is not the quantity of obligations assumed, but whether the assumption and carrying out of those obligations is inconsistent with the role of a reinsurer. If a reinsurer has substituted itself for the ceding insurer, assuming and supplanting some of the

roles of the ceding insurer, then policyholders deserve recourse against the company that is actually and fully responsible to carry out the duties owed to them under the coverage they purchased. This is especially true where, as here, the ceding insurer, Stonewall, claims to have no control over the manner in which NICO and Resolute carry out these assumed obligations.

IV. FULLER-AUSTIN IS ENTITLED TO PROCEED AGAINST NICO ON ITS CLAIMS FOR BREACH OF CONTRACT AND BAD FAITH BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

NICO's principal defenses to the claim that it may be sued for breach of contract are that, as a reinsurer, it cannot be sued and, under contract law, that it is not in privity of contract with Fuller-Austin, and that it has made no promise Fuller-Austin may enforce. As we have seen, NICO does not enjoy any protection against suit based on the fact that it calls itself a reinsurer. As for NICO's other points, by assuming exclusive responsibility to decide whether Stonewall policyholder claims should be paid, NICO has made Fuller-Austin a third-party beneficiary of its agreement assuming duties owed to Fuller-Austin by Stonewall.

A. When NICO Assumed Complete Control Over The Payment Of Claims To Stonewall Policyholders, It Exposed Itself To Claims By Stonewall Policy-holders For Breach of Contract And Breach Of The Implied Covenant Of Good Faith And Fair Dealing

NICO claims it cannot be liable for breach of contract or bad faith because it is not in privity of contract with Fuller-Austin and does not owe any contract duties to it. NICO Br.28-29. The fact that NICO is not a party to the insurance contract issued by Stonewall to Fuller-Austin is irrelevant. In

making these arguments, NICO fails to address the California case law holding that, when a reinsurer assumes and takes control over the obligations of ceding insurers to their policyholders, the agreement between the assuming reinsurer and the ceding insurer is treated as "a contract for the benefit of third parties." *Columbia Casualty*, 5 Cal.2d at 778. The fact that NICO is not a true reinsurer at all does not change the principle that the assumption creates third-party beneficiary rights in policyholders. Thus, while NICO asserts that Fuller-Austin "does not allege it is a third-party beneficiary of any alleged NICO-Stonewall agreement or of any other NICO agreement whatsoever," NICO Br. 28-29,[11] *Columbia Casualty* holds that an assignment of obligations owed to policyholders is a third-party beneficiary contract as to the ceding insurer's policyholders. 5 Cal.2d at 778. Third-party beneficiary rights arise even if the policyholder (Fuller-Austin) does not assent to the assignment. 5 Cal.2d at 779. The lack of such assent just means that Stonewall itself remains liable to Fuller-Austin, even as NICO becomes liable. *See Travelers*, 50 Cal.3d at 95-96.

Fuller-Austin has alleged all of the required facts, i.e., that NICO has "assumed the insuring obligations of Stonewall under the insurance policies issued to Fuller-Austin." [4]AA[6]:1128:1-2; 1129 (¶12). With respect to its claim for breach of contract, Fuller-Austin alleges that "NICO, by assuming Stonewall's obligations under the insurance policies issued by Stonewall to Fuller-Austin is now, by operation of California law, directly liable to Fuller-

[11] *See also* NICO Br.43 ("Since it is nowhere alleged that … (c) NICO agreed to the creation of some other agreement in which it expressly assumed liability direct to Fuller, NICO cannot be found liable for breach of contract, tortious or otherwise….").

Austin under Stonewall's insurance policies." [4]AA[6]:1139 (¶52). Nothing more is needed to allege a perfectly legitimate claim for NICO's contractual liability in this case.

NICO suggests in a footnote that a third-party beneficiary contract may only be enforced if it is made for the benefit of the third-party beneficiary, and that the assumption agreement here was for NICO's benefit. NICO Br. 29, fn.2, *citing* [4]AA[6]:001136. This argument overlooks the conclusion in *Columbia Casualty* that the assumption of obligations to policyholders creates a third-party beneficiary situation. This argument overlooks the fact that the Court does not have before it to consider the assumption agreement or its terms, so it cannot resolve what the agreements provide or whom they benefit. "Whether there has been an assumption of the obligation is to be determined by the intent of the parties as indicated by their acts, the subject matter of their contract or their words." *Gregors*, 158 Cal.App.2d at 751. Further, an assumption of contractual obligations owed to a third party does not cease to be for that party's benefit just because, after assuming obligations, the assuming party then exercises its control to frustrate and deprive the third party of the contract benefits owed.

NICO claims there can be no implied contract here because NICO made no promise *to Fuller-Austin*. Thus, NICO claims, Fuller-Austin could not have intended to make a promise to Fuller-Austin and an implied contract must be based on such an intent. NICO Br.29, fn.3. The rejoinder is this: even if the formal assumption contract between NICO and Stonewall did not grant NICO complete control over Stonewall's remaining claims payment

functions, the actual contractual relationship that has resulted, as shown by actual performance, and as described by the testimony of Stonewall's representatives, shows that NICO has assumed complete, unconditional control over Stonewall obligations to Fuller-Austin.

NICO contends that Fuller-Austin "cannot be contractually liable for more than it assumed," NICO Br.35. But this contention just assumes things that have not been established or are contrary to the allegations that have been made. Fuller-Austin alleges that complete control over claims payment (all that remains to be done under the Stonewall/Fuller-Austin relationship) has been assumed by NICO. Fuller-Austin is suing NICO for its failure to adjust and pay valid claims. Nobody is seeking to impose on NICO an obligation that it did not assume.

The trial court erred in terminating on the pleadings Fuller-Austin's contract and bad faith causes of action.

V. IF FULLER-AUSTIN'S EXISTING COMPLAINT FAILS TO STATE A CLAIM, IT WAS ERROR FOR THE TRIAL COURT TO DENY LEAVE TO AMEND

Defendants argue that leave to amend should not have been granted because the new material Fuller-Austin offered in support of amendment, in its motion for new trial, is cumulative of what Fuller-Austin's existing complaint already alleges. *See* NICO Br.53; Resolute Br.18-23.

Fuller-Austin agrees insofar as defendants are suggesting that the principal focus on appeal is on the adequacy of Fuller-Austin's existing complaint. But if this Court were inclined to uphold the trial court's view that the existing complaint does not state a claim, Fuller-Austin could amend,

materially alter the existing allegations, and thereby establish Fuller-Austin's rights to press forward with claims against NICO and Resolute.

First, Fuller-Austin could strike out use of the term "reinsurer" insofar as it is interpreted as some binding assertion that NICO is an indemnity reinsurer eligible to protections enjoyed only by indemnity reinsurers.

Second, Fuller-Austin could add allegations showing that, whatever the genesis or labels associated with the relationship between Stonewall and NICO, and even if that relationship was originally contemplated as being one of ceding insurer and indemnity reinsurer, the actual relationship that has ensued is not that of ceding insurer and reinsurer and not one whereby NICO or Resolute are actual agents acting on Stonewall's behalf.

Third, based on the deposition of Joseph Follis, Stonewall's former Vice-President, Fuller-Austin can allege that the NICO-Stonewall relationship is not an insurance relationship at all because NICO has not assumed any insurance risk, given the fixed caps on annual payments of claims that NICO imposes on Stonewall. As a result, provisions of California law that restrict suits against traditional indemnity re*insurers* cannot be used to benefit NICO in this case because these statutes apply only to indemnity reinsurers and only to those among that group who assume insurance risk. A titular reinsurer who does not assume insurance risk is not a true reinsurer of any kind and hence not eligible to claim any of the rights extended to "reinsurers." *See* AOB-44-46. Thus, NICO is wrong to assert the immateriality of evidence showing that the purported NICO reinsurance arrangement was actually a loan. *See* NICO Br.54. Such facts show that NICO could not qualify as a reinsurer in this case

because, as a lender, it did not assume any insurance risk, as an indemnity "re*insurer*" must do in order to qualify as a reinsurer. *See* 3 Cal. Code Regs., tit. 3, §2303.2 ("'Reinsurance Contract' or 'reinsurance agreement' or 'reinsurance treaty' means a contract by which an insurer transfers all or part of its *risk* on business it has directly written or assumed.").

NICO also misunderstands Fuller-Austin's purpose in referencing Mr. Follis' testimony in support of Fuller-Austin's motion for new trial. NICO asserts that the courts must accept as true the existence of the statements in the Follis deposition transcript but not the truth of Mr. Follis' testimony, *citing Garcia v. Sterling* (1985) 176 Cal.App.3d 17.

Properly analyzed, the Follis testimony is offered to show the further allegations Fuller-Austin could make, *viz.*, allegations consistent with the testimony that Mr. Follis gave, on behalf of Stonewall, about the true nature of the Stonewall-NICO relationship. The *Garcia* case, cited by NICO, is inapposite. *Garcia* discusses the effect of taking judicial notice of a document. Doing so does not mean the court accepts as true all of the statements within the document. But Fuller-Austin is not asking for judicial notice. Moreover, *Garcia* was an appeal of an order awarding sanctions where facts were relevant. Here the issue is what Fuller-Austin could allege. It is the obligation of the court to accept as true everything Fuller-Austin has or could allege. *Garcia* does not hold otherwise. Indeed, that case distinguishes the rule that statements in a pleading must be accepted as true.

VI. CONCLUSION

The judgments merit reversal.

Dated: May 26, 2011

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS LLP

By _____
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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the attached brief is proportionately spaced, using TimesRoman 13-point type, contains 9,708 words.

Jason B. Komorsky

May 26, 2011

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is Morgan, Lewis & Bockius LLP, 300 South Grand Avenue, Twenty-Second Floor, Los Angeles, California 90071-3132.

On May 26, 2011, I served the attached **APPELLANT'S REPLY BRIEF** on the parties in this action by placing a true copy thereof in sealed envelopes, addressed as follows:

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I placed each such sealed envelope, with postage thereon fully prepaid for first-class mail, for collection and mailing at this firm, following ordinary business practices. I am readily familiar with this firm's practice for collecting and processing of correspondence, said practice being that in the ordinary course of business, correspondence (with postage thereon fully prepaid) is deposited in the United States Postal Service the same day as it is placed for collection.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on May 26, 2011, at Los Angeles, California.

Lisa Wright